Supreme Court, U.S.
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NO. 10-399

IN THE

SUPREME COURT

OF THE

UNITED STATES

GLENN SMITH-Petitioner

Vs.

WALTER A. McNEIL, Sec., Of Department of Corrections, STEPHEN W. KEGERREIS, SGT. B. CAMPBELL, CPO N. RIOS AND DARRYL COLLINS-Respondents

ON PETITION FOR A WRIT OF CERTIORARI

TO

UNITED STATES COURT OF APPEALS

ELEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Glenn Smith, *pro se*
Martin Correctional Institution
1150 S.W. Allapattah Road
Indiantown, Florida 34956-4397

QUESTIONS PRESENTED

Pursuant to *Sandin v. Connor*, 515 U.S. 473, 484, 115 S. Ct., 2293, 2300 (1995), did Petitioner sufficiently evidence "a typical and significant hardship" condition of both administrative and disciplinary confinement in Florida's prison, so that this Court's due process standards decisions in regard to subjecting prisoners to "restrictive conditions of confinement." See *Wilkinson v. Austin*, 545 U.S. 209, 223, 125 S. Ct. 2384, 2394, 162 L.Ed.2d 174 (2005). Apply and/or did Petitioner's additionally evidenced particular conditions of disciplinary confinement require due process, in regard, to a prison disciplinary action taken against the Petitioner on 12/20/03?

Did Petitioner sufficiently plead/evidence a retaliatory disciplinary action claim?

Is the Florida Department of Corrections, "Disobeying... any order." Rule 33-601.314 § 6-1, Florida Administrative Code, disciplinary rule constitutionally valid under a *Turner v. Safley*, 482 U.S. 78, 89-90, 107 S. Ct. 2254, 2261-62, 96 L.Ed.2d 64 (1987) analysis?

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IN THE

SUPREME COURT

OF THE

UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINION BELOW

The opinion of the United States Court of Appeals at Appendix A to the petition and is unpublished.

The order of the United States District Court appears at Appendix B and is unpublished.

JURISDICTION

The date on which the United State Court of Appeals decided my case was 12/21/10.

A timely petition for rehearing was denied by the Court of Appeals on 1/4/10

Appendix C, and a copy of the order denying rehearing on 2/8/10 appears at Appendix D.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Constitution of the United States First Amendment:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press, or of the right of people peaceably to assemble, and to petition the government for redress of grievances.

Constitution of the United States Eighth Amendment:

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment imposed.

Constitution of the United States Fourteenth Amendment:

Section 1. .... No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive

any person of life, liberty, or property without due process of law; not deny to any person within its jurisdiction the equal protection of the laws.

Florida Administrative Code Rule 33-601.314 § 6-1

33-601.314 Rules of Prohibited Conduct and Penalties for Infractions

6-1 Disobeying verbal or written order, any order given to an inmate, or inmates by a staff member or authorized person. 30 DC + 60 GT

STATEMENT OF THE CASE

Petitioner filed a complaint under the Civil Rights Act 42 U.S.C. § 1983 form incorporated by reference a handwritten verified complaint under the Civil Rights Act U.S.C. § 1983 (Complaint) with appendix demonstrating on 12/18/06 complaining of and evidencing the constitutional invalidity of a fabricated pretextual reprisal Florida Department of Corrections (FDC), disciplinary report issued on 12/20/03. (Or) *Smith v. Secretary of Fla. Dept. of Corr.*, #06-14361Graham/White-U.S.District Court; (S.D. Fla. 7/30/08) (Magistrate Report filed 6/25/07). See Complaint (less appendix documentation), Appendix F. Petitioner's complaint raised and evidenced First Amendment retaliatory disciplinary action, pp. 3-7, 10, and referenced appendices; substantive due process constitutional violation by the DOC rules under which the Petitioner was infracted, Fla. Admin. Code Rule 33-

601.314 § 6-1, pp. 10a-12; and procedural due process violation in the FDC disciplinary proceeding, pp. 12-18, and referenced appendixes.

The District Court Order decided that Petitioner's case was "due to be dismissed for failure to state a claim upon which relief may be granted pursuant to 28 U.S.C. § 1915 (e) (2) (B) (iii)." *Smith*, #06-14361-civ-Graham/White, 2-3, Appendix B. The Order, *id.* specifically addressed the Petitioner's retaliatory disciplinary action claim deciding that "the disciplinary actions herein arose out of Mr. Smith's failure to comply with a direct order, and this, as discussed in the Magistrate Judge's (Report). Appendix B, p. 5, which had also recommended that Petitioner had no procedural due process claim because Petitioner had established no liberty interest following *Sandin*, report, p. 9, see *infra*, citing Report, p.13-14, and that the FDC Rule was constitutional, Report, pp. 9-

10, finding that "There is no question that a rule requiring inmates to comply with verbal and written orders of prison officials is essential to operation of the State's prison and is absolutely necessary to preserve internal order and discipline and to maintain Institutional security."

Petitioner timely appealed and briefed the District Court's errors of fact and law; in dismissing Petitioner's case as to his First Amendment retaliation claim by applying a standard inconsistent with *Mt. Healthy*, substantive due process rule; constitutionally challenge by misanalyzing the rule under *Turner*, and procedural due process in the disciplinary proceeding violations claims because Petitioner had demonstrated a liberty interest in being free from restrictive confinement pursuant to *Sandin*.

The Eleventh Circuit's opinion in *Smith v. Secretary of Fla. Dept. of Corr.*, #09-11423 (11th Cir. December 21, 2009),

Appendix A, affirmed the dismissal of Petitioner's action by the District Court, addressing each of Petitioner's issues as cited, *infra*, pp. 10, 17-18, 31.

Petitioner timely filed a Petition for Rehearing & Rehearing En Banc, Appendix C, which was denied by an order filed 2/8/10, Appendix D.

REASONS FOR GRANTING THE WRIT

Pursuant to *Sandin v. Connor*, 515 U.S. 473, 484, 115 S. Ct. 2293, 2300 (1995). Did Petitioner sufficiently evidence "a typical and significant hardship" conditions of both administrative and disciplinary confinement in Florida's prison so that this Court's due process standards decisions in regard to subjecting prisoners to "restrictive conditions of confinement." See *Wilkinson v. Austin*, 545 U.S. 209, 223, 125 S. Ct. 2384, 2394, 162 L.Ed.2d 174 (2005), apply and/or did Petitioner's additionally evidenced particular conditions of disciplinary confinement require due process in regard to a prison disciplinary action taken against the Petitioner on 12/20/03?

This Court has recognized that "in *Sandin*'s, wake, the Court of Appeals have not reached consistent conclusions for identifying the baseline from which to

measure what is atypical and significant in any particular prison system." *Wilkinson v. Austin*, 545 U.S. at 273, 125 S. Ct. at 2394.

In the case below, *Smith v. Secretary of Fla. Dept. of Corr.*, #09-11423 (11th Cir. December 21, 2009), the Court found that "although Smith asserted a number of ways in which disciplinary confinement differs from being in general population, he also conceded that the conditions in disciplinary confinement essentially were the same as the conditions in administrative confinement. According, we concluded that Smith did not have a liberty interest in being free from disciplinary confinement, and the District Court correctly found that he failed to state a due process claim." Appendix A.

This decision evidently abrogated the Circuit Court's prior controlling precedent in *Parker v. Cook*, 642 F.2d 865,

875 (5th Cir. Unit B April 17, 1981).[1] Which, while decided on a pre-*Sandin,* standard, still relevantly hold that, "We think it self-evident that the State of Florida cannot by merely attaching the label of administrative segregation to its actions, transform what is in substance disciplinary action subject to due process restrictions into administrative action outside the purview of the due process clause." After noting, that the District Court had "[r]eason[ed]; that the consequences of administrative segregation, were virtually identical; to the consequences of disciplinary segregation." And "found that the rule of *Wolff v. McDonnell,* 418 U.S. 539, 94 S. Ct., 2963 (1974)...applies to inmates in administrative segregation." Where

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[1] See *Bonner v. City of Pritchard,* 661 F.2d 1206, 1207 (11th Cir. 1981) ("We hold that decisions of the United States Court of Appeals for the Fifth Circuit...as that Court existed on September, 1981 handed down by that Court prior to the close of business on that date, shall be binding as precedent in the Eleventh Circuit for this Court....")

Petitioner plea and evidenced, through an affidavit of atypicality, Appendix E, the "virtually identical" conditions of administrative and disciplinary confinement in Florida at the time of the disciplinary action taken against the Petitioner at issue in his civil rights complaint, Appendix F, to demonstrate that in Florida 1) the proper *Sandin* analysis to "restrictive conditions of confinement," *Wilkinson*, 545 U.S. at 223, 125 S. Ct. at 2394, was comparing the conditions of administrative and disciplinary confinement to open-population.[2] 2) Any time in Florida's confinement was an "atypical and significant hardship." *Sandin*, 515 U.S. at 484, 115 S. Ct. at 2300; under the totality of conditions consideration[3] and

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[2] *Keenan v. Hall*, 83 F.3d 1083, 1089 (9th Cir. 1986) ("the *Sandin*, Court seems to suggest that a major difference between the conditions for the general population and the segregated population triggers a right to a hearing.")

[3] Cf. *Wilkinson*, 545 U.S., at 224, 125 S. Ct., at 2395("While any of these conditions standing alone[in super maximum prison] might not be

3) any anticipated reliance on *Rodgers v. Singletary*, 142 F.3d 1252-1253 (11th Cir. 1998)-finding that "approximately two months" "in administrative confinement" at "South Florida Reception Center in 1993" did "not show[ ]...depriv[ation] of a constitutionally protected liberty interest as defined by *Sandin*, "would be misplaced where the *Rodgers*, opinion did not show consideration of any conditions of or the totality of conditions that Petitioner pled. Ultimately, the District Court in Petitioner's case below made merely the conclusory finding that "Plaintiff's 30 days in isolation was not an excessive, atypical, or significant hardship that would implicate the Due Process Clause. See *Sandin...*, *Rodgers...142 F.3d...1253...*" Report of

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sufficient to create a liberty interest, taken together thy impose atypical and significant hardship in a correctional context."); *Sealey v. Giltner*, 116 F.3d 47, 52 (2nd Cir. 1997)("in a series of decisions... we have indicated the deniability of fact-finding before determining whether a prisoner has a liberty interest in remaining free from segregated confinement after *Sandin*."

Magistrate Judge, 9, "ratified, affirmed and approved in its entirety." *Smith*, # 06-14361-CIV-Graham/White, *see* Appendix B.

In regard to the DR of 12/20/03, Petitioner pled in addition to the typicality established by FDC rule and/or practice-atypical and significant hardship conditions of administrative and disciplinary confinement in Florida prisons Affidavit, *see* Appendix E, the personal context of Petitioner's total confinement of 6 days administrative confinement (A/C) followed by 118 days disciplinary confinement (D/C) because of five(5) successive fabricated pretextual reprisal disciplinary reports, including the 12/20/03 disciplinary report and the debilitating, unconstitutional cold to which Petitioner was exposed.[4,8] which precipitated Petitioner's conflict with prison officials

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[4] *See Keenan*, 83 F.3d. at 1089("We suggest that if [the District Court] finds conditions in IMU [Intensive management Unit] that violate the Eighth Amendment, the transfer to IMU would impose 'atypical and significant hardship'")

resulting in the 12/20/07 DR, see Complaint, Appendix F pp. 3-9. The opinion in *Smith*, # 09-11423, thus appears to omit consideration of many of the facts that form "the touchstone of the [*Sandin*] inquiring..., the nature of th[e] conditions [of confinement] themselves.", *Wilkinson*, 545 U.S. at 223, 125 S. Ct. at 2394.

This Court should also consider the argument that a demonstration of retaliation in a prison context alone meets the "atypical and significant hardship" *Sandin*, liberty interest standard. See question presented, *supra*, p. 16.

This Court should standardize the methodology for making a *Sandin*, liberty interest determination to which due process applies in determining that Florida's prison administrative and disciplinary commitment require the procedural due process prescribed by this Court and that Petitioner was due the due process required for prison disciplinary

proceeding in regard to the 12/20/03 Disciplinary issued to Petitioner.

Did Petitioner sufficiently plead/evidence a retaliatory disciplinary action claim?

In *Smith*, # 09-11423, in regard to Petitioner's claim of retaliatory prison disciplinary action, Complaint, p.10, Appendix F, the Court's finding that:

> Accepting the allegations of the complaint as true, prison official issued Smith a disciplinary report because he refused to obey an order to uncover his air vent, which he had covered to block cold air from coming out of it. Thus, the allegations of the complaint established that prison officials issued the report because he failed to comply with an order not because he engaged in First Amendment expression. Accordingly, we conclude that there was no causal

connection between any protected expression and the disciplinary report.

Opinion, p. 4, Appendix A, Not only ignores the "'Specific non-conclusory factual allegations' that established improper motive causing cognizable injury, "*Crawford-El, v. Britton*, 523 U.S. 574, 598, 118 S.Ct. 1584, 1596 1597, 140 L.Ed.2d 759 (1998), Petitioner evidenced the context of five successive fabricated pretextual reprisal disciplinary reports (DRs) resulting in six days AC followed by 118 eighteen day DC, *see* Complaint, p. 6, Appendix F. Apparently precipitated by Respondent Kegerreis, but also the specific immediate context of the 12/20/03 DR which was a protest of the unconstitutionally cold conditions of confinement,[5] *see*

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[5] The First Amendment protects not only verbal, and written expression but also symbols and conduct that constitute "symbolic speech." *See Tinker v. Des*

Complaint, pp. 6-8, Appendix F. While the DR stated that Petitioner "refused to comply" with "orders to remove paper out of vent," Complaint Appendix G, Petitioner's evidence is that in response to "a direct order to uncover the vent" Petitioner responded "I will as soon as the heat is turned on" Compliant, p. 7, Appendix F. No reasonable inference, even in a life most favorable to the respondents can be made from Petitioner's facts, which could result in a conclusion that Petitioner "refused to obey order." Opinion, p. 4, Appendix A. In fact, Petitioner's Complaint, p. 7, Appendix F,

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> *Moines*, Indep. Comty. School Dist., 393 U.S. 503, 505-506, 89 S.Ct. 233, 21 L.Ed.2d 731 (1969). .... In evaluating whether particular conduct possesses "sufficient communications elements" to implicate First Amendment protections, courts must ask whether "[a]n intent to convey a particularized message would be understood by those who viewed it." Id. [*Texas v. Johnson*, 491 U.S. 397, 404, 109, S.Ct. 2533, 105, L.Ed.2d 342 (1989)]....

Littlefield v. Forney Independent School Dist., 268 F.3d. 275, 282 (5th Cir. 2001).

goes on to evidence that "a while later the heat was turned on p[etitioner] immediately removed the paper" and that this was witnessed. Thus, the facts of the Complaint establish that the Petitioner was disciplined simply for his oral and symbolic complaints on conditions of confinement.[6]

The Opinion also completely ignores Petitioner's pleading, Compliant, pp. 13-14, Appendix F, that the "order to uncover his vent" was arbitrary and illegal where it did

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[6]

> Indeed, a prisoner can sufficiently state a claim for relief when he alleges that prison officials issued base less disciplinary tickets against him in retaliation for pursuit of administrative remedies.
>
> *Lekas v. Briley*, 405 F.3d 602, 614 (7th Cir. 2005) (internal citations and quotation omitted). Oral grievances are protected the same as written grievances. *See Pearson v. Wellborn*, 471 F.3d. 732, 741 (7th Cir. 2006) ("We are also unconvinced that the form of expression-i.e., written or oral-dictates whether constitutional protection attaches."). ....

Watkins v. Kasper, 560 Fed. Supp. 2d 691, 694 (N.D. Ind. 2008).

not implement any notice FDC rule or procedure,[7] and in context, deliberately exposed the Petitioner to unconstitutional conditions of confinement of a debilitatingly cold cell,[8] Complaint, pp. 6-8, Appendix F, exacerbated by the forced

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[7] *See Connery v. Sakai*, 15 F.3d 1463, 1468 n.8 (9th Cir. 1993) (finding that "under the due process clause" the court must consider whether the inmate may be punished "for violating the underlying rule" when given a misconduct report for "refusing to obey an order.")

[8] *See Chandler v. Crosby*, 379 F.3d 1278, 1290 n.22 (11th Cir. 2004) ("Many courts have also considered claims brought by prisoners subjected to extreme cold, either alone or in combination with other prison conditions. *See, e.g.,...Mitchell v. Maynard*, 80 F.3d 1433, 1443 (10th Cir. 1996) (...the court was 'troubled by the lack of heat combined with the lack of clothing and bedding'....) ...."); *Valdez, v. Farman*, 766 F. Supp. 1529, 1535 (E.D. Cal. 1991) ("a prisoner can invoke a clearly existing constitutional right, and say 'no' to prison officials who are unjustifiably about to infringe on that route, without fear, that force can be used with impunity in any event to compel her to give up that clearly established right"); *Fruit v. Norris*, 905 F.2d 1147, 1150 (8th Cir. 1990) ("prison inmates are protected from punishment for refusing to perform an unconstitutional assignment, as they are protected from having to perform the assignment"); *Dooley v. Quick*, 598 F.Supp. 607, 616 n.6 (D.R. I 1984).("The fact an inmate may obtain redress after he has been harmed does not excuse prison officials from the duty to prevent harm in the first place.")

cold air blowing from the cell's vent where the cold could not be adequately ameliorated by the provided clothing or bedding.

The Opinion also ignores the judicially noticeable and briefed, Brief of Appellant, p.11, fact that, pursuant to FDC rules, any disciplinary action is discretionary with FDC officials, and thus essentially arbitrary, which gives rise to an inference that the 12/20/03 DR was retaliatory where no disciplinary action or lesser sanction (see FDC Fla. Admin. Code R. 33-601.303 ("reprimand an inmate verbally"; written "Corrective Consultation of Inmate")) was possible.

There appears to be a conflict among the circuits as to what facts are sufficient to properly plead a retaliatory disciplinary action claim.

It is Petitioner's position that the Court in *Hasan v. U.S. Dept. of Labor*, 400

F.3d 1001, 1005-1006 (7th Cir. 2003) as correctly stated:

> ...the requirements for proving causation in a retaliation case. As is well settled in the context of employment discrimination, a plaintiff who complains that he was retaliated against for exercise of his right to free speech need not prove that, had it not been for that exercise, the adverse action he is charging would not have occurred. All he need prove is that his speech was a "motivating factor" in the employer's decision to take adverse action. *Mt. Healthy School Dist. Board of Education v. Doyle*, 424 U.S. 274, 287, 97 S.Ct. 568, 50 L. Ed. 2d 471 (1997). .... if the employee leaps that hurdle, the burden shifts to the employer to show that he would have taken the action, anyway,

> even if his heart had been pure. See the cases just cited.... We cannot think of a reason why a stricter standard of causation should apply when the plaintiff is a prisoner rather than an employee. A prisoner has less freedom of speech than a free person, but less is not zero, and if he is the victim of retaliation for the exercise of what free speech what he does have, he should have the same remedy as his free world counterpart. Cf. *Turner v. Safley*, 482 U.S. [72] at 84, 107 S.Ct. 2254 [96 L. Ed. 2d 64 (1987)].

Instead of considering the totality of the circumstances which Petitioner pled,[9]

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[9] *See Millhouse* v. *Carlson*, 652 F.2d 371, 373-374 (3rd Cir. 1981):

> We read appellant's complaint alleging that he was subjected to a conspiratorially planned series of disciplinary actions as retaliation for initiating a civil rights action against prison official. ....

see Complaint, pp. 3-7, Appendix F, to determine whether the Petitioner demonstrated that retaliation "was a 'motivating factor'" for the 12/20/03 DR, the *Smith*, 09-11423, court apparently considered only Respondent's narrow DR statement of facts, see Complaint Appendix G, to the side "that officials issued the report because [appellant] failed to comply with an order."

Contrasted against the *Hasan* analysis cited, *supra*, this finding appears to follow a standard sent by the Eighth

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> .... The court below should not have considered each allegation of Millhouse's complaint independently of the others. As the Fourth Circuit stated in *Russell v. Oliver*, 552 F.2d 115, 116 (4th Cir. 1997), a liberal construction of a *pro se* complaint "requires that the Judge view all of [the] allegations not as isolated incidents, but rather as a unit." Analyzed in this manner, it is clear that appellant's complaint alleges that various prison officials engage in a series of action designed to punish him for seeking access to the courts.

(footnotes omitted).

Circuit that "While a prisoner can state a claim or retaliation by alleging that disciplinary actions are based upon false allegations, no claim can be state when the alleged retaliation arose from discipline implemented for acts that a prisoner was not entitled to perform," *Orebaugh v. Caspari*, 910 F.2d 526, 528 (8th Cir. 1990), or, though relying on *Mt. Healthy* specifically, the "but for" standard relied on by at least three other circuits in regard to prisoner retaliation claims. *See McDonald v. Hall*, 610 F.2d 16, 18 (1st Cir. 1979)("Plaintiff must prove that he would not have been transferred 'but for' the alleged [retaliatory] reason."); *Smith v. Maschner*, 899 F.2d 940, 949-950 (10th Cir. 1990) ("[Inmate Smith] must prove that 'but for' the retaliatory, the incident to which he refers, including disciplinary action would not have taken place."); *Orebaugh*, 910 F.2d at 528 (Heaney, J., dissenting) ("To prevail on his retaliation claim, Orebaugh

has the concededly heavy burden of showing that prison officials who disciplined him had an impermissible motive for doing so, an that but for this impermissible motive, the disciplinary charges would not have been brought."); *Woods v. Smith*, 60 F.3d 1161, 1166 (5th Cir. 1995) ("To establish a claim of retaliation, an inmate must allege the violation of a specific constitutional right and be prepared to establish that but for the retaliatory motive, the complained of incidents-such as the filing of disciplinary reports as in the case at bar-would not have occurred"(footnote omitted)).

It appears that in Petitioner's case, the Eleventh Circuit was requiring a heightened standard of pleading/proof in regard to retaliation claim analogous to the heightened burden of proof disproved of by this court in *Crawford-El*, 523 U.S. at 594-597, 118 S.Ct at 1594-1596.

This Court should resolve the conflict between circuits for pleading retaliation in prisoner cases in determining that Petitioner sufficiently pled/evidenced as retaliatory disciplinary action.

Is the Florida Department of Corrections' "Disobeying...any order," 33-601.314 § 6-1, Florida Administrative Code, disciplinary rule constitutionally valid under a *Turner v. Safley*, 482 U.S. 78, 89-90, 107 S.Ct. 2254, 2261-2262, 96 L.Ed.2d 64 (1987) analysis?

FDC disciplinary rule 33.601.314 § 6-1 in its entirety reads: "Disobeying verbal or written order-any order given to an inmate or inmates by a staff member or other authorized person."

This was the rule under which Petitioner was infracted for the 12/20/03 DR, *see* Complaint, Appendix F.

Because the Petitioner believed that any order that he was given by correctional officers exposed the Petitioner to unconstitutional conditions of confinement, in this case, cold, was illegal [8] and Petitioner should not be punished for

disobeying an illegal order,[10] Petitioner challenged constitutionality of the FDC "Disobeying...any order" rule where on its face the rule was not limited to legal or reasonable orders, but allowed officials to infract inmates for failing to obey the most outrageous illegal, unreasonable orders as well which apparently abrogated any due

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[10] *See Schoroder v. Maybellos*, 823 Fed. Supp. 806, 811 (D. Hawaii 1993):

> When the prison has decided to punish an inmate for failing to obey an order, the lawfulness of the order is a legitimate component of the analysis. *See, e.g., St. Clair v. Cuyler*, 634 F.2d 109 (3rd Cir. 1980) (analyzing First Amendment concerns when inmate refused to doff religious headgear); *Jiload v. O' Brien*, 645 F.2d 556 (6th Cir. 1981) (small consideration of whether constitution clearly established a right to wear a beard after inmate refused to shave); *Tucker v. Dickery*, 613 F. Supp. 1124 (W. D. Wis. 1985) (inmates' refusal to submit to urinalysis require Fourth Amendment analysis); *Jefferson v. Southworth*, D.R.I. 1978) (prison could not maintain unconstitutional lockup despite inmate disobedience). Thus, in order to show that...punishment was justified, the Defendant must justified the legality of ...order. *rev'd* 29 F.3d 634 (9th Cir. 1994) (table) (finding no established right of prisoner violated by order at issue).

process consideration of the legality of an order as a disciplinary hearing issue (or element of the offense)[10]

The Opinion in *Smith*, 09-11423, 7, made merely conclusory findings that:

> Here, (1) there is a valid, rational connection between the regulation and the necessity of maintaining safety and security in the prisons; (2) alternative means existed for Smith to express his First Amendment rights; (3) revising the rule to require prisoner's to comply only with legal orders would create vagueness in the regulation and allow prisoners to challenge every order they believed to be illegal; and (4) the rule is not an exaggerated response to safety concerns.

The Opinion appears to defy any legal logic applying *Turner*, 482 U.S. at 89-

90, 107 S.Ct. 2261-2262 ("when a prisoner regulation impinges on inmates' constitutional rights, the regulation is valid if it is reasonably related to legitimate penological interest"; "[f]irst, there must be a 'valid, rationale connection' between the prison regulation and the legitimate governmental interest put forward to justify it"; "second factor relevant...is whether they are alternative means of exercising the right that remains open to be prison inmates"; "third consideration is the impact accommodations of the asserted right will have on guards and other inmates, and on the allocations of prison resources generally"; "Finally, the absence of ready alternatives is evidenced of the reasonableness of a prison regulation. .... By the same token the existence of obvious, easy alternatives may be evidenced that the regulation is not reasonable, but is an 'exaggerated response' to prison concerns") to the FDC

"Disobeying...any order" rule. As to the first *Turner* factor, the opinion fails to illuminate how there can be any "valid, rational connection between the regulation and necessity of maintaining safety and security in the prisons" as to any *illegal* or unreasonable order.[8,11] Petitioner's case particularly illustrates how illegal orders can endanger prisoners' health and even case law documents that illegal orders can endanger prisoners' health and safety, *see Fruit*, 905 F.2d at 1147 (9th Cir. 1990) (finding an eighth amendment claim against prison officials regarding (refused) orders to work in a wet-well of human waste without protective clothing and argument). The Opinion's conclusion defies

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[11] *See Graham* v. *Baughman*, 772 F.3d 441, 445 (8th Cir. 1985) ("'neither the state nor the inmate has any interest in treating an innocent party as guilty,' *LaBatt* v. *Twmey*, 513 F.2d 641, 646 (7th Cir. 1975)"); *Carrillo* v. *Fabian*, A03-1663 (Min. July 28, 2005) ("the government derives no benefit from disciplining inmates who have committed no offense. The institution's goals of preparing and rehabilitating inmates for re-entry into society are better achieved if they are treated fairly.").

the established case law concerning Turner's first prong that "Nothing can save a regulation that promotes an illegitimate goal." *Amatel v. Reno*, 156 F.3d 192, 196 (D.C. Cir. 1998), *also cf. Waterman v. Farmer*, 183 F.3d 208, 214 (2nd Cir. 1999) ("the statute fails to satisfy this [first *Turner*] prong if the statute promotes an interest that is illegitimate or not neutral, or if the statute bears no 'valid rational connection' to the asserted interest").

The Opinion's conclusion concerning the second *Turner* factor, stating that "alternative means existed for Smith to express his First Amendment rights" does not explain what those "alternative means" were for the Petitioner in this case and Petitioner certainly cannot ascertain what "alternative means" exist in the context of the Petitioner having an opportunity "to tell [the] official[s], before [*they*] *act*, that [Petitioner] believes [their] action[s] [are] illegal." *Clarke v. Stalder*,

121 F.3d 222, 230 (5th Cir. 1997) *vacated in part on jurisdictional grounds,* 154 F.3d 186 (5th Cir. 1998) (en banc) *cert. denied* 525 U.S. 1151, 119 S.Ct. 1052, 142 L.Ed.2d 58 (1999) as this established case law discerns is the criteria for discerning "alternative means" for this factor.

In regard to the third *Turner* factor, the Opinion appeared patently absurd where the court determines that adding the *limiting factor* of "legal" order to the rule "would create vagueness in the regulation." That prisoners should be able to "challenge every order they believe to be legal" is established by case laws as a retained due process right of prisoners, *see Schroeder,* n.10, and other states' existing prison rules establish the "legal order" criteria as workable. *See Williams v. Nix,* 1 F.3d. 712, 714 n. 23 (9th Cir. 1993) ("**Disobeying a Lawful Order**. An inmate commits an offense under this subsection when the inmate refuse to obey an order,

rule, or regulation, or procedure , written or verbal, given by any staff of the Division of Corrections, or any other person in authority which is reasonable in nature, and which gives reasonable notice of the conduct expected. " "Rules, Regulations, and Disciplinary Procedures for Government of Iowa State Penitentiary Inmates (1984)"); *Gibbs v. Cook*, 232 F. Supp. 2d 1171, 1176 n.2 (D. Or. 2002) ("Disobedience of Order II, OAR 291-105-0015(4) (b) occurs when an inmate 'overtly refuses to follow a valid order or...fails to comply with a valid order, which creates a threat to the safety, security, or orderly operations of the facility....'").

Petitioner's reliance on extant prison rules cited in the proceeding cases belies the Opinion's conclusion in regard to the fourth *Turner* factor that "the rule is not an exaggerate response to safety concerns." These existing rules demonstrate that the obvious easy alternative to the current FDC

"Disbobeying...any order" rule is to simply amend the rule to limit its scope to "legal" and reasonable orders to accommodate prisoner's retained rights to protect prisoners from illegal orders and from arbitrary disciplinary action which fully addresses any prison security concerns. This court should take judicial notice of the fact that the FDC amends its rules tens of times a year demonstrating that rule amendment is standard operating procedure and has *de minimus* impact on normal FDC operations. This "obvious, easy alternative" is "evidence that regulation is not reasonable, but is an 'exaggerated response' to prison concerns." *Turner*, 482 U.S. at 90, 107 S.Ct. at 2262.

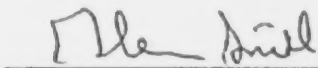
This Court should decide that the circuit court's merely conclusory application of *Turner* to the FDC "Disobeying...any order" rule is an insufficient determination as to the constitutionality of the rule in finding that

the rule, at least, is an exaggerated response to legitimate penological interest.

CONCLUSION

The Petition for a Writ of Certiorari should be granted.

Respectfully submitted,



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